No. P19-50 TWENTY-EIGHTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA, EX. REL., MICHAEL S. REGAN, SECRETARY, NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY, DIVISION OF WASTE MANAGEMENT, Plaintiff-Appellee, v. WASCO, LLC, Defendant-Appellant	From Buncombe County

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PLAINTIFF-APPELLEE'S RESPONSE TO DEFENDANT-APPELLANT'S PETITION FOR WRIT OF SUPERSEDEAS

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PLAINTIFF-APPELLEE'S RESPONSE TO DEFENDANT-APPELLANT'S PETITION FOR WRIT OF SUPERSEDEAS

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INTRODUCTION

Under Rules 8(a) and 23(d) of the North Carolina Rules of Appellate Procedure, Plaintiff-Appellee the State of North Carolina, Department of Environmental Quality (the "Department"), Division of Waste Management,

responds to Defendant-Appellant WASCO, LLC's petition for writ of supersedeas.

Through its petition, WASCO seeks an extraordinary remedy: a stay pending appeal of an injunction ordering WASCO to comply with an opinion of this Court. WASCO has not justified such extraordinary relief.

First, WASCO has not shown a likelihood of success on the merits of its appeal. On 18 April 2017, this Court issued a unanimous decision holding that WASCO "was the party responsible for and directly involved in the post-closure activities subject to regulation" at the former Asheville Dyeing & Finishing Plant located at 850 Warren Wilson Road, Swannanoa ("the Facility") in Buncombe County. *WASCO LLC v. N.C. Dep't of Env't and Natural Res.*, __ N.C. App. __, __, 799 S.E.2d 405, 414, *rev. denied* __ N.C. __, 805 S.E.2d 684 (2017) (hereafter the "2017 Opinion"). This Court's ruling obligated WASCO to comply with the post-closure permitting obligations at the Facility because "WASCO is an operator of a landfill for purposes of the post-closure permitting requirement." *Id.* at __, 799 S.E.2d at 415.

Second, WASCO has not identified any irreparable harm. As the operator of the Facility, WASCO is jointly and severally liable for post-closure permitting and post-closure care, regardless of the existence (or not) of any

other responsible parties. Thus, WASCO is obligated to perform the work required by the superior court's injunction – any other issues are immaterial. In addition, to the extent other responsible parties are also liable for post-closure care or remediation at the Facility, WASCO can seek to allocate and recover costs from those parties through a contribution action under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 to 6992k, or the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 to 9675.

Thus, the Department respectfully requests that this Court deny WASCO's petition for supersedeas.

STATEMENT OF THE CASE

As stated above, on 18 April 2017 this Court issued a unanimous opinion adverse to WASCO. That opinion resulted from WASCO's September 2013 challenge in the Office of Administrative Hearings ("OAH") to the Department's assertion that WASCO was an "operator" of a landfill at the Facility and needed to obtain a post-closure permit under the State's Hazardous Waste Program. Petition for a Contested Case Hearing, *WASCO et al. v. N.C. Dep't of Env't and Natural Res.*, No. 13-EHR-18253 (Off. of Admin.

Hr'gs Filed Sept. 27, 2013). The 2017 Opinion fully sets forth the history of that case up to the time the mandate issued.

On 23 May 2017, WASCO filed a Petition for Discretionary Review under N.C.G.S. § 7A-31, seeking review of the 2017 Opinion. On 1 November 2017, the Supreme Court denied WASCO's Petition for Discretionary Review, cementing this Court's 2017 Opinion as the final ruling in this matter.

Rather than cooperating with the Department to comply with this Court's decision and applicable regulatory requirements, WASCO instead sought to avoid its responsibilities through the initiation of two separate, but related, proceedings before the Environmental Management Commission ("EMC") with the object of nullifying or overturning this Court's recently issued opinion.

First, on 4 December 2017, WASCO filed a "Petition for Rule Making re 15A NCAC 13A.0102(b)" asking the EMC to change the regulatory definition of the term "operator." The EMC denied WASCO's petition on 8 March 2018.

Second, on 8 December 2017, WASCO filed a Petition for Declaratory Ruling before the EMC, requesting a ruling that "DEQ lacks the authority to require WASCO to obtain a post-closure permit or a post-closure order for the Facility pursuant to 15A NCAC [13A] .0113(a) (adopting 40 CFR § 270.1(c))."

WASCO amended its Petition for Declaratory Ruling in February of 2018 and then filed a second Petition for Declaratory Ruling before the EMC on 3 March 2018, to replace its amended Petition. The EMC denied WASCO's Petition for Declaratory Ruling on 10 May 2018. On 15 August 2018, WASCO filed a Petition for Judicial Review of the EMC's ruling in Wake County Superior Court, naming the Department's Division of Waste Management as the Respondent. On 28 September 2018, the Division moved to dismiss WASCO's Petition for Judicial Review for failing to name the proper party. That matter is still pending in Wake County.

On 19 April 2018, the Department filed a Complaint in this matter, seeking injunctive relief against WASCO to, *inter alia*, enforce this Court's 2017 Opinion. On 9 July 2018, WASCO filed a motion to dismiss the complaint. On 18 July 2018, the Department filed a motion for summary judgment. Those matters came on for hearing before the Honorable R. Gregory Horne, Superior Court Judge Presiding, during the 29 October 2018, session of Buncombe County Superior Court.

On 31 October 2018, and after hearing arguments of both parties, the superior court announced its decision to deny WASCO's motion to dismiss and grant the Department's motion for summary judgment. The superior

court directed the Department to prepare written orders. On 27 November 2018, the superior court issued its written orders denying WASCO's motion to dismiss and granting the Department's motion for summary judgment. The superior court entered a permanent injunction ordering WASCO to, *inter alia*, comply with this Court's 2017 Opinion.

On 27 December 2018, WASCO filed a Notice of Appeal of the superior court's orders, as well as a motion to stay and motion for reconsideration of the superior court's orders. The Honorable R. Gregory Horne, Superior Court Judge Presiding, heard WASCO's motion to stay and motion for reconsideration during the 14 January 2019 session of Buncombe County Superior Court. On 23 January 2019, Judge Horne issued orders denying WASCO's motion to stay and motion for reconsideration.

STATEMENT OF THE FACTS

This Court's 2017 Opinion provides a detailed factual background. In summation, the facts demonstrate that WASCO has impeded the timely and complete cleanup of contaminated property in Swannanoa, North Carolina by assuming liability through its words and conduct over many years and then refusing to perform its statutory and regulatory obligations to ameliorate the harm onsite. *See WASCO*, __ N.C. App. at __, 799 S.E.2d at 408-09. Even now,

after this Court unambiguously ruled that WASCO is responsible for post-closure care at the Facility, WASCO refuses to meet its legal obligations.

In holding that WASCO was the operator of the Facility, this Court cited several responsibilities WASCO performed at the Facility. *WASCO*, __ N.C. App. at __, 799 S.E.2d at 413-14. These responsibilities included, *inter alia*, operating an air sparge/soil vapor groundwater remediation system, and conducting groundwater sampling and analysis. *Id.*

WASCO continued to undertake at least some of these actions until 1 June 2018. Response in Opposition to Plaintiff's Motion for Summary Judgment, *State ex. rel. N.C. Dep. Envtl. Quality v. WASCO*, No. 18 CVS 01731, p. 13 (Buncombe Cnty. October 25, 2018) (Def's Pet. Ex.[1] 1, p. 121). Notably, WASCO did not cease these remedial activities until several months after the instant injunction action was filed, and then attempted to use its own failure to perform post-closure remediation in support of its motion to dismiss. *Id.*

In its response to the Department's motion for summary judgment in the present case, WASCO stated that it "has no intention or contractual obligation to undertake any of those [post-closure] actions in the future."

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[1] Defendant's Exhibit 1 is not numbered. Cited page numbers are to the actual numerical page of Defendant's Petition including exhibits.

Response in Opposition to Plaintiff's Motion for Summary Judgment, *State ex. rel. N.C. Dep. Envtl. Quality v. WASCO*, No. 18 CVS 01731, p. 2 (Buncombe Cnty. October 25, 2018) (Def's Pet. Ex. 1, p. 110).

REASONS WHY THE WRIT SHOULD NOT ISSUE

WASCO is, in substance, asking for a stay of an injunction enforcing this Court's prior opinion while it pursues an appeal asking this Court to overturn itself. To obtain that extraordinary relief, WASCO must show (1) that it's likely to succeed on the merits of its appeal and (2) that it would suffer irreparable harm absent a stay. *See, e.g., Ridge Cmty. Invs., Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977); 16A Charles Alan Wright et al., *Federal Practice & Procedure* § 3954 (4th ed. 2008). As shown below, WASCO has not met either requirement.

I. WASCO IS UNLIKELY TO SUCCEED ON THE MERITS OF ITS APPEAL WHERE THIS COURT HAS PREVIOUSLY RULED AGAINST WASCO IN THIS MATTER.

This Court's 2017 Opinion held that "WASCO is an operator of a landfill for purposes of the post-closure permitting requirement," obligating WASCO to comply with the post-closure permitting requirements at the site. *WASCO*, __ N.C. App. at __, 799 S.E.2d at 415. Instead of taking action to comply with this Court's decision, WASCO now posits five reasons why it is either

incapable of complying with the post-closure permitting requirements or why those requirements no longer apply. For the following reasons, WASCO is unlikely to succeed on the merits of those arguments.

A. The owner of the property is not a necessary party to an action seeking enforcement of WASCO's obligations as the operator.

WASCO first argues that it is likely to succeed on appeal because the Department brought this action against WASCO and did not join the property owner, Dyna-Diggr. The specific matters at issue in this case pertain solely to WASCO's failure to take the action required by this Court's 2017 Opinion, a case in which WASCO was the sole Appellant. While Dyna-Diggr also has obligations as the current owner of the property under the State Hazardous Waste Rules, 15A NCAC 13A .0100 to .0119 (incorporating and adopting RCRA), these owner obligations are separate from, and in addition to, WASCO's obligations as an operator. See 40 CFR 270.1(c), 270.10(b) (incorporated by reference at 15A NCAC 13A .0113). Such liability is joint and several with WASCO's operator liability. *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 732 n.3 (8th Cir. 1986) (citing cases). To the extent Dyna-Diggr fails to abide by its obligations as an owner, the Department may take separate enforcement action against Dyna-Diggr at that time, under N.C.G.S. § 130A-18

or the State Hazardous Waste Rules. Thus, Dyna-Diggr is not a necessary party for enforcing the Court's decision finding WASCO liable as the Facility's operator under RCRA and the State Hazardous Waste Rules.

WASCO dedicates a significant portion of its argument to a claim that Dyna-Diggr is refusing to participate in the permitting process. First, WASCO's claim is based on a document which is not properly before this Court. Dyna-Diggr's counsel sent the email in question two weeks after the superior court issued its orders in this matter. Pursuant to Rule 11(c) of the North Carolina Rules of Appellate Procedure, "any item not filed, served, submitted for consideration, admitted, or for which no offer of proof was tendered, shall not be included" in the record on appeal. *See In re Warrick*, 1 N.C. App. 387, 390, 161 S.E.2d 630, 632 (1968) (holding that exhibits outside the record will not be addressed). Because the email was not before the superior court when it decided the issues now on appeal, it is not relevant to deciding those issues.

Second, WASCO misstates the contents of the email. WASCO's petition claims that WASCO's counsel "inquired whether Dyna-Diggr would participate in the permitting process . . . Dyna-Diggr refused." (Def's Pet. p. 8, ¶ 6). In contrast, the email reads:

> During our call, you indicated that your client, Dyna-Diggr, LLC ("Dyna-Diggr") is unwilling to sign a RCRA Part B permit application for the property located 850 Warren Wilson Road in Swannanoa, North Carolina (the "Property") at this time. Would you please respond to this email to confirm that my understanding of our call is correct?

(Def's Pet. Ex. 2, p. 151) Counsel for Dyna-Diggr responded, "Your understanding is correct." *Id.* The email makes no mention of Dyna-Diggr's participation in the permitting process, let alone its refusal to do so.

Similarly, the email does not evidence a refusal to sign a Part B permit application when one is prepared and its contents and requirements are made known. At this point, there is no final permit application requiring Dyna-Diggr's signature. WASCO must prepare the permit application before Dyna-Diggr is required to sign. *See* 15A NCAC 13A .0113(b) (incorporating by reference 40 CFR 270.10(b) ("When a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit, except that the owner must also sign the permit application.")).

Notably, it was WASCO who wrote in its response to the Department's motion for summary judgment that WASCO "has no intention . . . to undertake any of those [post-closure] actions in the future." Response in Opposition to Plaintiff's Motion for Summary Judgment, *State ex. rel. N.C.*

Dep. Envtl. Quality v. WASCO, No. 18 CVS 01731, p. 2 (Buncombe Cnty. October 25, 2018) (Def's Pet. Ex. 1, p . 110). Based on the foregoing, the party who refuses to fulfill its legal obligations is WASCO, not Dyna-Diggr.[2]

WASCO's continued allegations against Dyna-Diggr serve only to obfuscate the real issue here – WASCO's failure to comply with the post-closure requirements of the State Hazardous Waste Rules – and, thus, do not bolster WASCO's claim that it is likely to succeed on appeal.

B. WASCO cannot now avail itself of the six month time period for submitting a Part B permit application when the Department requested submission of the Part B permit application more than nine years ago, and this Court declared WASCO subject to that requirement almost two years ago.

WASCO argues that the writ should issue because it is entitled to at least six months to submit a Part B permit application – approximately 90 days beyond what the superior court ordered. WASCO is correct that the rules provide "at least six months from the date of request to submit part B of the

[2] Even if Dyna-Diggr did refuse to sign the permit application or to cooperate in the permitting process, WASCO is only required by the superior court's injunction to do that which WASCO itself can do in good faith using best efforts. Injunction p. 3, ¶ 1 ("WASCO shall in good faith make best efforts to submit [the Part B permit] application in approvable form."). Thus, Dyna-Diggr's actions cannot place WASCO in legal jeopardy. Only WASCO's own actions or omissions will do so.

application." 40 CFR § 270.10(e)(4) (2018). However, WASCO ignores the fact that the Department requested that WASCO submit a Part B permit application on 6 January 2010 – more than nine years ago. Affidavit of Mary Siedlecki, *State ex. rel. N.C. Dep. Envtl. Quality v. WASCO*, No. 18 CVS 01731, ¶ 5 (Buncombe Cnty. filed July 19, 2018) (Def's Pet. Ex 1, p. 69). Additionally, this Court's 2017 Opinion specifically identifies the Part B permit as one of the post-closure standards with which WASCO must comply. *WASCO*, __ N.C. App. at __, 799 S.E.2d at 407.

WASCO has been aware of its post-closure obligations for years and has elected to, and continues to, pursue a path of delay and avoidance through litigation. Any claim that it now has "insufficient time to do as this Court asks" is the result of WASCO's demonstrated preference for litigation over compliance, and should not be the basis for issuing a writ of supersedeas.

C. WASCO's speculative belief that it cannot perform the tasks required does not provide a legal basis for overturning this Court's prior opinion.

WASCO next argues that it is likely to succeed on appeal because it "has no physical presence at the Facility or in North Carolina" and, therefore, could not actually implement the Part B permit requirements. (Def's Pet. p. 3) This argument conflicts with the facts. WASCO was performing a number of

remediation activities at the Facility both before and after the Court issued the 2017 Opinion. Only after the Department brought the present action, and seemingly after WASCO adopted a new legal strategy, did WASCO cease performing those activities at the Facility. Contrary to the import of WASCO's argument, WASCO's open defiance of this Court's 2017 Opinion does not show a likelihood of success on appeal.

D. Any changes to the Generator Improvement Rules do not affect WASCO's status as the operator of the Facility.

After failing to succeed in challenging its status as *operator* of the Facility, WASCO has seemingly adopted a new legal strategy of attacking the Facility's closure status, which was established more than twenty-five years ago by agreement of the then owner/operator, prior to WASCO acquiring the post-closure obligations. *WASCO*, __ N.C. App. at __, 799 S.E.2d at 408. WASCO now argues that the EPA's Generator Improvement Rules, which became effective in North Carolina on March 1, 2018, rendered moot this Court's 2017 Opinion. (Def's Pet. p. 17, ¶ 18)

However, this Court found WASCO responsible for the post-closure permitting requirement as the *operator* of the Facility – not as the *owner* or *generator*. The responsibilities of operators are separate and apart from the

responsibilities of generators. *See* 40 CFR § 270.1. Thus, as the superior court found, changes to the hazardous waste rules regarding post-closure responsibilities of *generators* have no bearing on WASCO's responsibilities as an *operator*.

E. The letter submitted by WASCO is not properly before this Court and, even if it was, does not provide a basis for overturning this Court's prior opinion.

In petitioning the Court, WASCO attached what it characterizes as "the EPA December 2018 RCRA Permit Guidance Letter." Similar to the email discussed in section I.A, *supra*, this letter is also not properly before this Court. The letter is dated 17 December 2018, more than two weeks after the superior court issued its orders. Because the letter was not before the superior court when it issued its orders, the letter is not relevant to determining whether or not the superior court properly issued those orders.

Moreover, the letter is of no precedential value here. The letter states that the EPA considered the "hypothetical," self-serving facts supplied to it by WASCO, and not the actual facts of this case, which differ materially. As the superior court found, this Court's decision holding WASCO liable as an operator of the facility is the law of the case, and the EPA letter does nothing to change that.

II. WASCO DOES NOT FACE A RISK OF IRREPARABLE HARM.

WASCO will not suffer irreparable harm if a stay is denied. First, as set forth in more detail above, WASCO's argument that it is not an operator of the Facility subject to RCRA's post-closure permitting requirements is entirely devoid of merit. This Court has already held exactly this in its prior decision, and no amount of hand-waving can change this fact.

Second, even assuming *arguendo* that WASCO might prevail on its necessary party argument (which the Department denies, as set forth in Part I.A, *supra*), this provides no basis for a finding of irreparable harm. Regardless of whether Dyna-Diggr is a necessary party to this suit, WASCO, as the Facility's operator, is jointly and severally liable for the full extent of the post-closure care at the Facility. *Ne. Pharm. & Chem. Co.*, 810 F.2d at 732 n.3. If Dyna-Diggr is found to be a necessary party, Dyna-Diggr can be added to this case so that it may be ordered to sign the post-closure permit. But WASCO will still be responsible for complying with all applicable permitting requirements, and under the principles of joint and several liability, the Department may look to WASCO alone to satisfy these requirements. *In re D.A.Q.*, 214 N.C. App. 535, 539, 715 S.E.2d 509, 512 (2011); *see also* 15A NCAC 13A .0113(b) (incorporating by reference 40 CFR 270.10(b) ("When a facility or

activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit, except that the owner must also sign the permit application.")). Thus, WASCO suffers no irreparable harm in undertaking these responsibilities during the pendency of the appeal.

Moreover, WASCO may bring claims under RCRA and CERCLA to recover remediation costs from any other responsible parties, provided the necessary prerequisites are met. *See* 42 U.S.C. § 6972; 42 U.S.C. § 9607(a)(4)(B); 42 U.S.C. § 9613(f)(1); 42 U.S.C. § 9613(f)(3)(B). Thus, assuming that there are other parties in addition to WASCO that are responsible for some portion of the costs of post-closure care (a fact WASCO has not established), WASCO can seek to recover money from them through separate actions. For this reason, WASCO can recoup a fair share of any expenditures undertaken during the pendency of the appeal from any other parties later proven to be responsible, along with WASCO, for post-closure care of the Facility.

In sum, since WASCO is indisputably the operator of the Facility, WASCO will not suffer any harm in being held to the responsibilities of an operator during the pendency of the appeal. Whether Dyna-Diggr is a necessary party or not, WASCO, as the Facility's operator, remains jointly and

severally liable for the full extent of post-closure costs. Moreover, to the extent WASCO can establish a right to contribution from any other responsible parties, WASCO may recover these costs in separate actions under RCRA or CERCLA. There is thus no possibility that WASCO will spend money for post-closure care of the Facility during the pendency of the appeal that it would not otherwise have to spend once the appeal is concluded.

III. A STAY ON APPEAL WOULD ALLOW WASCO TO CONTINUE AVOIDING THE POST-CLOSURE PERMITTING REQUIREMENTS WITH WHICH THIS COURT PREVIOUSLY HELD WASCO MUST COMPLY.

Instead of preventing irreparable harm, granting a writ of supersedeas would allow WASCO to perpetuate the harm resulting from its failure to clean up the Facility. In 2017, this Court held that WASCO "is an operator of a landfill for purposes of the post-closure permitting requirement." *WASCO*, __ N.C. App. at __, 799 S.E.2d at 415. WASCO should have understood this Court's holding as a directive to comply with its post-closure permitting obligations. Instead, WASCO, by its own admission, ceased doing the little work at the Facility it was doing at the time this Court issued the 2017 Opinion. As the superior court correctly found, this Court's 2017 Opinion is the law of the case. "[T]here would be no end to a suit if every obstinate litigant could,

by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members." *Jones v. Wilmington & W. R. Co.*, 131 N.C. 133, 136, 42 S.E. 559, 560 (1902). Granting a writ of supersedeas in this matter would frustrate this Court's mandate, and allow contamination at the Facility to continue unchecked while WASCO pursues its meritless appeal.

CONCLUSION

For the foregoing reasons, the Department respectfully requests that this Honorable Court deny WASCO's petition for writ of supersedeas.

This 1st day of February, 2019.

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I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

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